NO. 83-1815

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In the Supreme Court of the United States

OCTOBER TERM, 1983

FIRST MISSISSIPPI NATIONAL BANK,

PETITIONER,

v.

INTERNATIONAL MARINE TOWING, INC.,

RESPONDENT

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

PAGE

Table of Contents i
Table of Authorities ii
Statement of the Case 1
Reasons for Denial of the Writ 4
Conclusion 12
Certificate of Service 13
Appendix A—Findings of Fact and
Conclusions of Law A-1

TABLE OF AUTHORITIES

CASES **PAGE**

Caribbean Maritime Finance Co., Ltd. v. Marina Mercante Nicaraguense, 470 F.2d 277 (5th Cir. 1972) 11

Challenger, Inc. v. Dunro, 227 F.2d 918 (5th Cir. 1955) 9

Flota Maritime Browning de Cuba, SA v. Snobl, 363 F.2d 733 (4th Cir. 1966), *cert. denied,* 385 U.S. 837 (1966) 7

Frontera Fruit Co. v. Dowling, 91 F.2d 293 (5th Cir. 1937) 9

Inland Credit Corp. v. M/T BOW EGRET, 552 F.2d 1148, 1152, n.4 (5th Cir. 1977) 11

Jack Nielson, Inc. v. Tug PEGGY, 428 F.2d 54 (5th Cir. 1970), *cert. denied,* 401 U.S. 955 (1971) 7

OCEANO, 148 F. 131 (S.D. N.Y. 1906) 5

Peterson Towing Corp. v. Captain Abrams, Inc., 388 F.Supp. 1166 (E.D. N.Y. 1975) 6

Rainbow Line, Inc. v. The M/V TEQUILA, 480 F.2d 1024 (2nd Cir. 1973) 5, 6

Roberts v. Echternach, 302 F.2d 370 (5th Cir. 1962) 11

Sasportes v. M/V SOL de. COPACABANA, 581 F.2d 1204 (5th Cir. 1978) 9

Schilling v. A/S D/A Dannebrog, 320 F.2d 628 (2nd Cir. 1963) 11

The Schooner FREEMAN v. Buckingham, 59 U.S. 182 (1855) 6

MISCELLANEOUS:

Allen, Liens: *Liabilities Arising from Delay or Failure in Performance,* 49 Tul. L. Rev. 970 (1975) 8

Benedict on Admiralty, (7th Ed. 1981) 8

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International Marine Towing, Inc., through undersigned counsel, opposes First Mississippi National Bank's Petition for a Writ of Certiorari.

STATEMENT OF THE CASE

At all times pertinent, the M/V KING'S CHALLENGER was owned by Southern Leasing Partners, a California limited partnership ("SLP") and was under bareboat charter to International Marine Towing,

Inc., a California corporation ("IMT"), pursuant to a Bareboat Charter Party dated July 11, 1978. Under the terms of the agreement, SLP warranted that it would maintain the M/V KING'S CHALLENGER free of all claims, demands and liens of its creditors, and would not, through its acts or omissions, cause the said vessel to become attached, seized, or otherwise withdrawn, or withheld from the custody, possession or control of IMT.

Following delivery of the vessel, IMT made substantial expenditures in outfitting and repairing the KING'S CHALLENGER so as to make the vessel seaworthy and fit for its intended use. These expenditures totaled over $145,000.00. Following this initial founding period, IMT engaged the KING'S CHALLENGER in a number of profitable towing operations and pursuant to the Charter Party, paid SLP $39,766.00 in charter hire.

Prior to entering the Bareboat Charter Party, SLP granted a preferred ship mortgage on the M/V KING'S CHALLENGER in favor of First Mississippi National Bank ("FMNB"). In August of 1978, just prior to an anticipated towing job which IMT had in the Caribbean, SLP did not make the requisite monthly payment on its note to FMNB because of an underlying dispute with the Bank.

The decision of the Court of Appeals from which FMNB seeks a writ of certiorari was rendered in consolidated cases.

In the first case, FMNB seized the M/V KING'S CHALLENGER in Jacksonville, Florida as a result of an apparent breach of the Preferred Ship Mortgage by SLP. While the vessel was under seizure, IMT intervened to assert a claim for a maritime lien and for breach of the

charter party by SLP, both of which arose as a result of the seizure of the vessel. Subsequently, a settlement agreement was reached in Jacksonville between SLP and FMNB which did not include the claim of IMT. With respect to IMT's claim, District Judge Melton ordered that a bond be posted in the amount of $50,000.00 as security for IMT's claim. In response to the Court's order, a cash bond for $50,000.00 was posted and the vessel was released from arrest. Thereafter, a corporate surety bond was substituted for the cash bond with FMNB as principal and Federal Insurance Company as surety. As soon as the corporate surety bond was posted, FMNB dismissed its complaint, the only remaining parties to the suit being SLP, the claimant of the vessel and the defendant, and IMT as intervening plaintiff.

While the suit in Jacksonville was pending, IMT sued SLP, *in personam*, in New Orleans seeking recovery of damages in tort and in contract for the breach of the charter party. SLP answered the suit denying liability.

Thereafter, over the objection of IMT, Judge Melton transferred the Jacksonville litigation to New Orleans pursuant to a Motion to Transfer for *forum non conveniens*, and that suit was consolidated with the pending New Orleans litigation for trial.

After extensive pretrial discovery, IMT and SLP entered into a settlement of their disputes. The settlement was presented to the Court in the form of Stipulated Findings of Fact and Conclusions of Law (A-1) pursuant to which SLP agreed, *inter alia*, that it had breached the Bareboat Charter Party and that, as a result thereof, IMT had a valid maritime lien against the M/V KING'S CHALLENGER. The stipulated Findings of Fact and Conclusions of Law were approved by the Court on November 24, 1982.

Although FMNB had voluntarily dismissed its complaint in the Jacksonville proceeding which it knew had been transferred to New Orleans, and although aware of the New Orleans proceeding in which it was not a party, FMNB sought to overturn the effect of the settlement agreement between the parties. Over the objection of IMT that FMNB had no standing, FMNB moved the Court to cancel the Release Bond and, notwithstanding the fact that FMNB was not a party to the suit, the Court allowed it to present a memorandum on the issue of whether IMT had a valid maritime lien to which IMT responded. After considering the memoranda from FMNB and IMT, the Court held that IMT did not have a maritime lien, both as a matter of law and as a result of a "prohibition of liens" clause in the Bareboat Charter Party. Judgment was entered on the basis of the Court's opinion vacating the Stipulated Findings of Fact and Conclusions of Law only insofar as it recognized a lien on the M/V KING'S CHALLENGER in favor of IMT. The Fifth Circuit reversed, holding that IMT, as bareboat charterer of the M/V KING'S CHALLENGER, was entitled to a maritime lien on that vessel as a matter of law and that the prohibition of liens clause contained in the Charter Party did not prevent that lien from arising.

REASONS FOR DENIAL OF THE WRIT

I.

The decision of the Court of Appeals is based upon the time-honored principle of admiralty law that a charterer is entitled to a maritime lien on the chartered vessel for breach of the charter. This principle does not change by virtue of the fact that the charterer is a bareboat, rather than a time or voyage, charterer.

A Charter Party or Charter Agreement is a maritime contract, the breach of which gives rise to a maritime lien. *The OCEANO*, 148 F. 131 (S.D. N.Y. 1906). The mere fact that this Charter Party is a Demise or Bareboat Charter does nothing to eliminate the essential maritime nature of the agreement, nor the legal consequences arising therefrom. Although the Bareboat Charterer might be characterized as the owner *pro hac vice* as to *third parties*, the charterer is nevertheless still the charterer as to the vessel owner and is thus entitled to a maritime lien against the vessel for the owner's breach of the Charter Party. In *The OCEANO, supra*, the vessel's *in rem* liability to a charterer for the breach of the Charter Party by the vessel's owner was made clear. Although the Charter Party involved in that case was a voyage charter, the Court made no distinction as to charter types and held:

> As soon as the performance of a charter party is commenced, a lien exists on the vessel in favor of the shipowner or charterer, and a suit in rem may be maintained for any liability of the master or owner arising therefrom.... Damages sustained by a charterer through breach of a charter contract constitutes a lien on the vessel.
> 148 F. 131, 133.

In the present case, IMT and SLP stipulated, and the District Court approved the conclusion, that SLP had breached the Charter Agreement. Respondent contends that SLP's breach of the charter, clearly a maritime contract, gave rise to a maritime lien against the vessel that was the subject of the charter.

In *Rainbow Line, Inc. v. The M/V TEQUILA*, 480 F.2d 1024 (2nd Cir. 1973), the vessel owner chartered the vessel to the charterer for a term of six months with

options to renew for two additional periods of six months. However, during the charter term, the owner prematurely withdrew the vessel from service. The charterer sought damages for the owner's breach and an arbitration panel awarded them. The charterer thereupon sought to have the award satisfied from the proceeds of the judicial sale of the vessel, which had been seized by other lienors and creditors. One such creditor, a mortgagee, contested the charterer's claim but the District Court held that the charterer had a valid maritime lien for the breach of the Charter Party by the owner. On appeal, the Second Circuit first noted that "American law is clear that there is a maritime lien for a breach of a charter party". 480 F.2d at 1027. The Court continued, citing the Supreme Court's statement in *The Schooner FREEMAN v. Buckingham*, 59 U.S. 190 (1855) that "charter-parties, must, in the invariable regular course of ... business, be made, for the performance of which the law confers a lien on the vessel... ." The Court then reasoned:

> The Truth of this statement is borne out by the fact that in rem jurisdiction in the admiralty exists only to enforce a maritime lien ... and a breach of a charter party is cognizable as an in rem action; ... therefore, the breach of a charter gives rise to a maritime lien.

Rainbow Line, Inc. v. M/V TEQUILA, 480 F.2d at 1028. (citations omitted). It is, therefore, undeniable that a maritime lien exists for a vessel owner's breach of a Charter Party. As is obvious, the lien exists in favor of the party that is damaged by the owner's breach, in this case, IMT, respondent herein.

In *Peterson Towing Corp. v. Captain Abrams, Inc.*,

388 F.Supp. 1166 (E.D. N.Y. 1975) the court was presented with a situation virtually indistinguishable from the case at bar. In *Peterson*, plaintiff was the bareboat charterer of a tug owned by the defendant. Plaintiff seized the vessel to enforce maritime liens for breach of the Charter Party by defendant for repairs made on the tug and for cash advanced by plaintiff for repairs. Like IMT, *Peterson* expended substantial sums of money in making the chartered vessel seaworthy only to have the vessel withdrawn from service prematurely. The Court in *Peterson* had no difficulty in recognizing the plaintiff as a maritime lienor for the repair debts as well as damages arising from the breach of the charter.

In *Jack Nielson, Inc. v. Tug PEGGY*, 428 F.2d 54 (5th Cir. 1970) *cert. denied* 401 U.S. 955 (1971) the Fifth Circuit, although not addressing the question directly, gave its tacit approval to a maritime lien for breach of a Bareboat Charter. The Court affirmed the exercise of admiralty and maritime jurisdiction over a dispute over a long-term Bareboat Charter-Purchase Agreement. The Fifth Circuit held that the *in rem* and *in personam* admiralty claims were severable from the claims arising from the sale part of the agreement. Accord, *Flota Maritima Browning de Cuba, SA v. Snobl*, 363 F.2d 733 (4th Cir. 1966), *cert. denied*, 385 U.S. 837 (1966).

In its Petition for Writ of Certiorari, FMNB cites a number of cases in support of the proposition that a bareboat charterer "stands in the shoes of the owner while the vessel is under charter and the charterer cannot acquire a lien on the vessel in his own behalf." These cases are all clearly distinguishable.

Apparently, FMNB bases its proposition on the

grounds that since a vessel owner, part owner or joint venturer, cannot acquire a maritime lien, neither can a bareboat charterer due to the degree of control he exercises over the vessel during the charter term. As a general principle of law, Respondent concedes that an owner or joint venturer may not acquire a maritime lien on its own behalf because of their ownership interest in the vessel. Nevertheless, a bareboat charterer may certainly obtain a maritime lien against the vessel for the breach of the Charter Party by the owner itself. In such an instance, the bareboat charterer is not creating the lien by its own action, the lien is created solely by the breach of the Charter Party by the owner. As one commentator has noted:

> [u]nless the parties provide otherwise, the shipowner is automatically given a lien upon all cargoes owned by the charterer for any amounts due under the charter, and the charterer will have a lien on the ship for unearned freight and for damages resulting from the owner's breach of the charter contract.

Benedict on Admiralty, 3-54 §3 (1981). Similarly, it has been said that "it is blackletter marine law in the United States that, under a charter party, liens for breach of the contract may arise and run in 'either direction', in one direction against the ship, and in the other against cargo". Allen, Liens: *Liabilities Arising From Delay or Failure in Performance*, 49 Tul. L. Rev. 970, (1975). Although the author of the latter source focuses his attention on voyage and time charters, no effort is made to limit the above general principle to those charter varieties. Respondent contends that no such limitation of this elementary maritime law principle is justified.

FMNB cit , *Sasportes v. M/V SOL DE COPACABANA*, 581 F.2d 1204 (5th Cir. 1978) as authority for the proposition that a bareboat charterer cannot acquire a maritime lien for breach of a Charter Party. Respondent concedes that the *Sasportes* Court, *in dicta*, did so hold; however, the *Sasportes* Court overruled the finding of the District Court that a joint venture existed and held that the plaintiff had a valid maritime lien. The elements of a joint venture, enumerated in the *Sasportes* opinion, are certainly not applicable to this case inasmuch as there has been no allegation that IMT and SLP were engaged in a joint venture.

FMNB's reliance on *Frontera Fruit Co. v. Dowling*, 91 F.2d 293 (5th Cir. 1937) is also misplaced. The party claiming a maritime lien against the vessel, Frontera, was not a charterer; the Court found the conclusion that it was a joint venturer to be "inescapable". 91 F.2d at 295. Indeed, Frontera possessed many characteristics of a joint venture which are not present here: It shared in the profits of the venture and was responsible for its debts. Indeed, Frontera was incorporated for the particular business venture involved and helped finance the purchase of the vessel. Further, as far as Respondent can ascertain, *Frontera* has never been cited in a reported case as authority for the position that a bareboat charterer may not have a maritime lien for breach of a Charter Agreement.

In *Challenger, Inc. v. Dunro*, 227 F.2d 918 (5th Cir. 1955) cited by FMNB, the Libellant was not a charterer nor a purported charterer, but was rather a mortgagee which took possession of the vessel in a private foreclosure of its mortgage. Such a situation is not even remotely similar to the facts of this case.

Moreover, although a bareboat charterer is the owner *pro hac vice* and thus not a stranger to the daily operations of the vessel from which liens usually arise, the bareboat charterer was in this instance a stranger to the financing of the vessel and as bareboat charterer was not in a position to prevent the owner's defaulting on the preferred ship mortgage. This caused the breach of the charter and IMT is entitled to a lien as a result of this breach.

II.

The Charter Party's prohibition of liens clause does not prevent the creation of a maritime lien for breach of the charter party in favor of the bareboat charterer.

Section 7.3 of the Bareboat Charter Party between IMT and SLP provides:

> Neither the *Charterer* nor the *Master* of the vessel shall have the right, power or authority to sell, assign, or transfer, or to create, incur or permit to be imposed upon the vessel any liens whatsoever except for crews' wages and salvage and inchoate operating expenses not discharged within sixty days from incurrance.

(emphasis added)

The express language of the clause appears to bar the charterer and the master from creating a maritime lien on the vessel. In the instant case, however, it was not the charterer or the master who created the lien, but the *owner*. In the Stipulated Findings of Fact, it is clear that SLP, the vessel owner, created the lien by breaching the Charter

Party. Thus, the "prohibition of liens" clause is inapplicable on its face. This same, inescapable conclusion was reached by the Fifth Circuit in *Roberts v. Echternach*, 302 F.2d 370 (5th Cir. 1962). After analyzing a similar charter provision, Judge Brown, in writing for the panel, stated:

> "The prohibition-of-liens clause ... does not undertake to deal with the power of the *owner* himself to subject his vessel to maritime liens. Indeed, the circumstances in which the owner could restrict his own power are severely limited and one could safely say, never to permit the owner, as such, to obtain any advantage. The clause ... has to do with the power of others—the master, agent, charterer, etc. to subject the vessel to liens for work done by third parties at the request of those presuming to speak for the ship". 302 F.2d 370, 372-73 (emphasis supplied).

Obviously, the "prohibition of liens" clause extends to the creation of liens in favor of third parties, and does not bar the creation of liens as a result of a breach of the Charter Party by the owner. The clause does not even speak to the issue of liens created by the owner's breach and does nothing to waive charterer's lien rights, especially considering the very strong presumption against such a waiver. *See Inland Credit Corp. v. M/T BOW EGRET*, 552 F.2d 1148, 1152, n.4 (5th Cir. 1977). Other courts that have addressed the question have come to the same conclusion as that expressed by Judge Brown in *Roberts. Caribbean Maritime Finance Co., Ltd. v. Marina Mercante Nicarguenese*, 470 F.2d 277 (5th Cir. 1972); *Schilling v. A/S D/A Dannebrog*, 320 F.2d 628 (2nd Cir. 1963).

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals was based upon well established principles of admiralty law and the writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of May, 1984, three copies of the foregoing Opposition to Petition for Writ of Certiorari have been served by hand delivery pursuant to Rule 28.3 of the Rules of the Supreme Court of the United States, on opposing counsel as indicated below:

W. E. Noel
Lemle, Kelleher, Kohlmeyer, Hunley,
Moss & Frilot
2100 Pan American Life Center
601 Poydras Street
New Orleans, Louisiana 70130

Accordingly, all parties required to be served have been served.

CLAYTON G. RAMSEY

APPENDIX "A"

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION
NO. 78-3728
CONSOLIDATED WITH
NO. 80-318

INTERNATONAL MARINE TOWING, INC.

Plaintiff,

Versus

SOUTHERN LEASING PARTNERS, LTD.,

Defendant.

STIPULATION OF FINDINGS OF FACT AND CONCLUSIONS OF LAW BY PLAINTIFF INTERNATIONAL MARINE TOWING, INC. AND DEFENDANT-CLAIMANT SOUTHERN LEASING PARTNERS, INC.

FINDINGS OF FACT

I.

Plaintiff, International Marine Towing, Inc. is a corporation organized and existing under and by virtue of the laws of the State of California.

II.

Defendant, Southern Leasing Partners, Ltd. is a partnership organized and existing under and by virtue of

the laws of the State of California with principal offices in Los Angeles, California.

III.

Southern Leasing Partners, Ltd. was the true and bonafide owner of the M/V KING'S CHALLENGER at all times pertinent to this litigation.

IV.

On July 11, 1978, International Marine Towing, Inc. and Southern Leasing Partners, Ltd. entered into a bareboat charter party agreement by which Southern Leasing Partners, Ltd. chartered bareboat and International Marine Towing, Inc. hired bareboat the M/V KING'S CHALLENGER, for a term of one hundred forty-four (144) months.

V.

The bareboat charter party agreement provided that International Marine Towing, Inc. would be entitled to the exclusive use, possession and control of the M/V KING'S CHALLENGER for a period of one hundred forty-four (144) months.

VI.

At the time of delivery the M/V KING'S CHALLENGER, and for the duration of the agreed term of the charter party, Southern Leasing Partners, Ltd. warranted and promised that it would maintain the M/V KING'S CHALLENGER free of all claims, demands, and liens of their creditors, and would not, through their act or

omission, cause the said vessel to become attached, seized, or otherwise withdrawn, or withheld from the custody, possession or control of International Marine Towing, Inc.

VII.

Pursuant to the terms of the bareboat charter party, International Marine Towing, Inc. took delivery of the M/V KING'S CHALLENGER and commenced making monthly payments of charter hire thereon.

VIII.

International Marine Towing, Inc. paid charter hire to Southern Leasing Partners, Ltd. in the sum of THIRTY-NINE THOUSAND SEVEN HUNDRED SIXTY-SIX AND NO/100 ($39,766.00) DOLLARS.

IX.

International Marine Towing, Inc. after taking delivery of the vessel, founded the M/V KING'S CHALLENGER at an expense of ONE HUNDRED FORTY-FIVE THOUSAND ($145,000.00) DOLLARS for hawsers, bridles, silverware, dishes, cooking utensils, bedding (including mattresses, pillows, blankets and sheets), ropes, steel hawsers, reels of wire, spare hawsers, sets of bridels, food, tools to be used on the engine, radio direction finder, gyro compasses, engine computer control panel, two-way international radio equipment, navigational equipment and repairs to items which were not in usable condition when International Marine Towing, Inc. took possession of the M/V KING'S CHALLENGER such as the engine, generators, air conditioners, etc.

X.

After the vessel was placed in a seaworthy condition, International Marine Towing, Inc. contracted and performed a tow from New Orleans, Louisiana to Puerto Cabello, Caracas, Venezuela and earned the sum of FIFTY-SIX THOUSAND FIVE HUNDRED NINETY TWO AND 50/100 ($56,592.50).

XI.

Subsequent to its first tow, International Marine Towing, Inc. contracted and performed a tow from Maracaibo, Venezuela to San Juan, Puerto Rico tow on August 20, 1978, pursuant to which it earned the sum of FIFTEEN THOUSAND ($15,000.00) DOLLARS.

XII.

Despite the fact that plaintiff paid defendant the charter hire as scheduled for July and August of 1978, Southern Leasing Partners, Ltd. failed to make the requisite monthly payment on its note to The First Mississippi National Bank in August of 1978 because of its underlying disputes with that bank. The aforesaid note was secured by a preferred ship mortgage on the M/V KING'S CHALLENGER.

XIII.

As a result of the dispute, Southern Leasing Partners, Ltd. placed the August 1978 monthly payment in an escrow account until the disputes with the bank could be resolved. As a result of this action, The First Mississippi National Bank considered Southern Leasing Partners, Ltd.

to be in default and proceeded to foreclose on its first perferred ship mortgage.

XIV.

On August 31, 1978, a Complaint was filed in the United States District Court, Middle District of Florida, by The First Mississippi National Bank and a warrant of arrest was issued for the arrest of the M/V KING'S CHALLENGER in Jacksonville, Florida.

XV.

The M/V KING'S CHALLENGER was arrested in Jacksonville, Florida on August 31, 1978 while enroute to perform a towing contract from Hamilton, Ontario to Cartagena, Columbia for Plaintiff for which Plaintiff expected to earn ONE HUNDRED SEVENTY-FIVE THOUSAND AND NO/100 ($175,000.00) DOLLARS.

XVI.

The profit contemplated by the Plaintiff on the uncompleted tow from Hamilton, Ontario to Cartagena, Columbia would habe been in the range of FORTY to FIFTY THOUSAND ($40,000.00-$50,000.00) DOLLARS.

XVII.

The M/V KING'S CHALLENGER remained in the custody of the United States District Court in Jacksonville, Florida until December 15, 1978 when it was released to Southern Leasing Partners, Ltd.

XVIII.

By virtue of the arrest of the M/V KING'S CHALLENGER, the vessel was withdrawn from service and the bareboat charter party was prematurely terminated which constituted a breach of the charter party.

XIX.

Prior to Southern Leasing Partners, Ltd. breach of the bareboat charter party agreement, International Marine Towing, Inc. made all charter hire payments to Southern Leasing Partners, Ltd. pursuant to the charter party at the time payments became due.

XX.

As a result of the arrest of the M/V KING'S CHALLENGER, the vessel was removed from the service of International Marine Towing, Inc. Without the vessel, International Marine Towing, Inc. was not able to continue its business or operations.

XXI.

At the time of the arrest of the M/V KING'S CHALLENGER, the vessel had approximately 100,000 gallons of diesel fuel on board which was valued in the amount of $50,000.00.

CONCLUSIONS OF LAW

I.

A charter party is a maritime contract and any

disputes which may arise in the interpretation of such a contract falls within the United States District Court's Admiralty Jurisdiction. *Bunge Corporation v. The M/V FURNESS BRIDGE*, 390 F.Supp. 603 (E.D. La. 1974).

II.

The foreclosure of the mortgage on the M/V KING'S CHALLENGER resulted in the breach of the charter party entitling International Marine Towing, Inc. to a maritime lien for labor and materials furnished to the M/V KING'S CHALLENGER. *Florida Yacht Brokers, Inc. v. The Yacht HUCKSTER*, 249 F.Supp. 371 (S.D. Fla. 1965).

III.

Due to Southern Leasing Partners, Ltd.'s disputes with The Mississippi National Bank which pre-existed the commencement of the charter party agreement with International Marine Towing, Inc., it failed to provide a seaworthy vessel at the inception of the bareboat charter party agreement, and as a consequence, International Marine Towing, Inc. has a valid claim for financial unseaworthiness against the M/V KING'S CHALLENGER, *in rem. Works v. Leather*, 97 U.S. 379 (1878). Since there were no unequivocal waiver of this requirement in the charter party agreement, this is a valid claim *Jordan v. Mayro N.E. Drilling Mud, Chemical and Engineering Service*, 214 F.2nd 410 (5th Cir. 1954).

IV.

The amount of damages sustained by International Marine Towing, Inc. is TWO HUNDRED FIFTY THOUSAND AND NO/100 ($250,000.00) DOLLARS.

V.

Accordingly, International Marine Towing, Inc. is entitled to judgment against Southern Leasing Partners, Ltd., as claimant of the M/V KING'S CHALLENGER only, and against the M/V KING'S CHALLENGER, or any bond posted in lieu thereof, *in rem*, in the amount of TWO HUNDRED FIFTY THOUSAND AND NO/100 ($250,000.00) DOLLARS.

New Orleans, Louisiana, this _____ day of November, 1981.

UNITED STATES DISTRICT COURT

Respectfully submitted,

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